77-446

No. _____

In the Supreme Court of the United States

October Term, 1977

TENNESSEE VALLEY AUTHORITY,
AUBREY J. WAGNER, and
DR. LEWIS B. NELSON

Petitioners

v.

FRANK L. EASTLAND, Individually and on behalf of all others similarly situated, et al.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CITATIONS

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case.

OPINIONS BELOW

The opinion of the court of appeals, as modified on respondents' petition for rehearing, is reported at 553 F. 2d 364.[1] The district court wrote three opinions. The opinion relevant to this petition is reported at 398 F. Supp. 541. The other two opinions, not involved here, appear in unofficial publications at 9 EPD ¶ 10,213 and 10 EPD ¶ 10,362, and have not been otherwise reported.

JURISDICTION

The judgment of the court of appeals, as modified, was entered on May 23, 1977. On August 19, 1977, Mr. Justice Powell signed an order extending the time to file this petition for certiorari to and including September 20, 1977, and this petition was filed within that period. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether in a suit by a federal employee under section 717(c) of the Civil Rights Act of 1964, as amended, the district court may adjudicate, in addition to those matters raised by the plaintiff in his administrative complaint, other matters which were, in fact, neither presented to nor investigated or decided by the agency, but which the court determines, after the fact, "may reasonably be expected to grow out of the administrative investigation of their claims."[2]

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[1] That court's original opinion was published at 547 F.2d 908, but later withdrawn It is reprinted in Appendex A hereto and appears in unofficial publication at 13 EPD ¶ 11,545.

[2] *Eastland* v. *Tennessee Valley Authority*, 553 F.2d 364,372 (5th Cir. 1977).

2. Whether in an action under section 717(c), Rule 23 or 24 of the Federal Rules of Civil Procedure permits federal employees to obtain individual monetary relief by intervention or by "participating" as class members after those employees have been judicially found to have forfeited their rights under that section, by abandoning their administrative claims or by filing untimely civil actions, and have had summary judgment "properly" entered against them individually.

3. Whether defendants other than the "head of the . . . agency" may be held liable for money damages and costs in a federal employee's suit under section 717(c) of the Civil Rights Act of 1964, as amended.

STATUTE, ORDER, REGULATION, AND RULES INVOLVED

Section 717 of the Civil Rights Act of 1964, as amended in 1972, 86 Stat. 111, 42 U.S.C. § 2000e-16 (Supp. V, 1975), provides in part:

> (a) All personnel actions affecting employees or applicants for employment . . . in executive agencies . . . as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds) . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.
>
> (b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies . . . as will effectuate the

policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. . . .

* * *

The head of each such . . . agency . . . shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. . . .

* * *

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action

as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Executive Order No. 11478 of August 8, 1969, 3 C.F.R. 803-05 (1966-70 Comp.), provides, in pertinent part:

> Sec. 4. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, color, religion, sex, or national origin. Agency systems shall provide access to counseling for employees who feel aggrieved and shall encourage the resolution of employee problems on an informal basis. . . .
>
> Sec. 5. . . . [T] he head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Order.

Title 5 of the Code of Federal Regulations which sets forth the Civil Service Commission's regulations issued pursuant to Executive Order No. 11478 reads in part:

> [§ 713.213(a)] An agency shall require that an aggrieved person who believes that he has been discriminated against because of race . . . consult with an Equal Employment Opportunity Counselor when he wishes to resolve the matter. . . .
>
> [§ 713.214(a)(1)] An agency shall require that a complaint be submitted in writing by the complainant or his representative and be signed by

the complainant. . . . The agency may accept the complaint for processing in accordance with this subpart only if—

(i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him to believe he had been discriminated against within 30 calendar days of the date of that matter, or, if a personnel action, within 30 calendar days of its effective date; and

(ii) The complainant or his representative submitted his written complaint to an appropriate official within 15 calendar days of the date of his final interview with the Equal Employment Opportunity Counselor.

Rule 23(a) of the Federal Rules of Civil Procedure reads in part:

> One or more members of a class may sue . . . as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 82 of the Federal Rules of Civil Procedure reads in part:

> These rules shall not be construed to extend . . . the jurisdiction of the United States district courts . . . .

STATEMENT

Respondent Eastland unsuccessfully applied for employment as a helicopter pilot with the Tennessee Valley Authority (TVA), a wholly owned government corporation. He originally filed this action claiming racial discrimination in TVA's operations and facilities in the Muscle Shoals, Alabama, area, because of his failure to be hired. He named as defendants the Chairman of TVA's 3-man Board of Directors (16 U.S.C. § 831(a) (1970)), as well as a subordinate employee and the corporation itself. When defendants (petitioners here) moved to dismiss or for summary judgment, respondent Eastland amended his complaint to add the 11 other respondents as plaintiffs. They include 10 TVA employees and a former employee. Class relief was also sought, with respondents alleging that they were proper representatives of a class consisting of *all* past, present, and future employees and applicants for employment with claims alleging racial discrimination in recruiting, hiring, assignment, training, and promotion in the Muscle Shoals area. Money damages as well as injunctive relief were also sought.

Petitioners renewed their motion and the district court granted the motion for summary judgment as to 10 of the respondents. It also held that a class action could not be maintained under section 717 as to claims which had not been raised in the administrative process and that the numerosity requirement of Rule 23(a)(4) of the Federal Rules of Civil Procedure was not satisfied.[3]

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[3] The district court acted prior to this Court's decisions in *Brown* v. *GSA*, 425 U.S. 820 (1976), and *Chandler* v. *Roudebush*, 425 U.S. 840 (1976). It held, as to the two remaining respondents, that judicial

The court of appeals sustained the district court as to nine of the respondents on exhaustion grounds. It reversed as to the remaining respondent although the record was undisputed that, of the three issues pleaded as to him by the complaint, one was barred by a prior judgment in the district court on the same issue (*see* 553 F.2d at 366 n.3); one was moot; and one had never been presented under the administrative procedures for handling discrimination complaints. The court of appeals also reversed the class action decision, holding that unnamed class members need not exhaust, that a class action was limited to the issues raised administratively, and that the nine respondents could "participat[e] in this lawsuit as unnamed members of the class" (553 F.2d at 373 n.21), despite its express affirmance of the district court's grant of summary judgment on their individual claims. Respondents filed a petition for rehearing, and the Fifth Circuit then expanded its decision, holding the action would not be limited to matters raised administratively, and that respondents could intervene if "a class action is available and proper." The court granted costs against all petitioners. This petition followed.

REASONS FOR GRANTING THE WRIT

1. *This Case Presents Important Questions Concerning a Remedial Federal Statute.*

This Court has not previously considered the interaction between what it has described as the

[3] (cont.) review was limited to the administrative record. On that basis, summary judgment was granted against respondent Sheffield; the administrative decision against respondent Eastland was reversed and remanded for further administrative proceedings.

"rigorous administrative exhaustion requirements and time limitations" of section 717 (*Brown* v. *GSA*, 425 U.S. 820, 833 (1976)) and the provisions of Rule 23 of the Federal Rules of Civil Procedure, governing class actions; Rule 24, governing intervention; and Rule 82, which states that "[t]hese rules shall not be construed to extend . . . the jurisdiction of the . . . district courts . . . ."

Under section 717, TVA, as a federal agency, has a statutory responsibility to carry out an aggressive administrative program for the eradication of employment discrimination with respect to its over 30,000 employees and the many thousands of persons who apply to it for employment each year. The federal government nationally bears the same responsibility. To carry out its responsibility, TVA maintains an Office of Equal Employment Opportunity (EEO) in the office of its General Manager, which includes among its duties the conciliation, investigation, and decisions of claims of prohibited discrimination. The decision of the court of appeals undercuts the statutory role given to the agency EEO process, which this Court has called "crucial" (*Brown* v. *GSA*, *supra* at 833) by permitting the judicial litigation of issues not raised before the agency, and rewarding the dilatory bringing of civil actions, which this Court found to be forbidden in *Brown*. The decision would also have significant impact far beyond the case at bar since it undercuts the comprehensive new regulations promulgated by the Civil Service Commission and binding on TVA for the administrative adjudication of class complaints. 42 Fed. Reg. 11,807 (1977). Under the court of appeals decision, these regulations could be bypassed with impunity. A decision by this Court is needed to define the judicial parameters

of the "complementary administrative and judicial enforcement mechanisms" (*Brown* v. *GSA*, *supra* at 831) established by section 717.

2. *The Fifth Circuit's Decision Conflicts With the Language of the Statute and the Principles Established by This Court's Decisions, as Well as With Decisions of Other Courts of Appeals.*

The Fifth Circuit's modified holdings on exhaustion and the effect of the Federal Rules were based on private sector cases alone, and are contrary to the statute and the principles enunciated by this Court in *Brown* v. *GSA*, 425 U.S. 820 (1976), and *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), among other cases.

As originally rendered, the court's opinion limited the action to "those issues that were raised by the representative parties in their administrative complaints." App. A at A-10. That holding was consistent with the Fifth Circuit's prior exhaustion holdings in federal employment cases (*see*, e.g., Penn v. *Schlesinger*, 497 F.2d 970 (1974), *cert. denied*, 426 U.S. 934 (1976); *Beale* v. *Blount*, 461 F.2d 1133, 1140 (1972); *Steele* v. *Tennessee Valley Authority*, 544 F.2d 516, *aff'g* 429 F. Supp. 1051 (N.D. Ala. 1976)), as well as with decisions in other circuits (*Ettinger* v. *Johnson*, 518 F.2d 648, 651-52 (3d Cir. 1975), *on remand*, 410 F. Supp. 519 (E.D. Pa. 1976); *Kurylas* v. *United States Dep't of Agriculture*, 373 F. Supp. 1072, 1074-75 (D.D.C. 1974), *aff'd*, 514 F.2d 894 (D. C. Cir. 1975)). It was also consistent with this Court's holding in *Brown* v. *GSA*, *supra*, "that § 717 of the Civil Rights Act of 1964, as amended, provides the *exclusive* judicial remedy for claims of discrimination in federal employment" (425 U.S. at 835); that "[i]nitially, the

complainant *must* seek relief in the agency that has allegedly discriminated against him" (*id.* at 832); and that compliance with the statute's "rigorous administrative exhaustion requirements" is one of the "preconditions" "[a]ttached to [the] right" to sue (*id.* at 832,833).[4] In its order on rehearing which broadened the permitted issues, the court below did not mention the conflict it was creating with these decisions, but relied solely on private sector cases. 553 F.2d at 372. Yet in *Brown*, this Court found its own cases "in the context of *private employment*" (emphasis in original) to be "inapposite" because they did not involve the considerations of sovereign immunity, exclusivity, and preemption undergirding section 717. 425 U.S. at 833. The Fifth Circuit's private sector cases are likewise inapposite and none involved a party against whom summary judgment had been entered. Its decision also contravenes the statute, which provides that a federal plaintiff must be "aggrieved" by the agency action "on his complaint" in order to sue. A person can scarcely be aggrieved by issues never raised before the agency. *See also Weinberger* v. *Salfi*, 422 U.S. 749 (1975). Furthermore, the statute in terms ratifies Executive Order No. 11478, which has as a primary requirement that the employee attempt to conciliate his claim informally prior to filing a formal complaint. This requirement is also written into the Civil Service Commission's regulations which provide that an agency *cannot* accept a complaint for investigation and decision processing unless attempts at conciliation on the issue involved have first been completed (5 C.F.R. § 713.213 (1977)). All nine respondents filed their claims with TVA under that Executive order. A different panel of the Fifth

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[4] Emphasis added unless otherwise noted.

Circuit has affirmed the binding nature of this requirement on TVA employees (*Steele* v. *Tennessee Valley Authority, supra*). Yet the panel below would write out of the statute, on the basis of private employment cases under a different statutory scheme, the requirement which Congress has here written into the law.

The decision also runs counter to the congressional intent in providing for administrative relief. If a class action may be brought on such unexhausted issues, it may well be lost on them. In such a case, Rule 23(b) not only binds unnamed class members to the adverse result, with no opportunity to "opt out," but even bars them from seeking administrative relief in the future. We do not think such a result could have been intended by Congress; and allowing these respondents to raise in court issues which they have avoided raising administratively creates the risks which this Court pointed out in *East Texas Motor Freight Sys. Inc.* v. *Rodriguez*, 45 U.S.L.W. 4524 (U.S. May 31, 1977):

> The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination [at 4527].

This fact is underscored because the broadening of the issues may well implicate issues and actions pending in other courts. This is not idle speculation, for the Fifth Circuit's decision causes serious conflicts with another case pending against TVA now in the Sixth Circuit (*Williams* v. *Tennessee Valley Authority*, 552 F.2d 691 (6th Cir. 1977), *petition for rehearing pending*).

The court of appeals further fell into error in allowing the nine respondents, who "are not properly before the court as named plaintiffs" (553 F.2d at 373 n.21) to "participat[e] in this lawsuit as unnamed members of the class" by intervention, and thus secure monetary relief on their individual claims. This Court determined in *Brown* v. *GSA* that section 717 was "pre-emptive" as well as "exclusive," and that a federal employee not properly in court under it could not come into court under other statutes. The federal district courts are courts of limited jurisdiction, and this Court has made clear that the Federal Rules, particularly Rule 23, cannot permit access to courts for those persons who do not fulfill statutory requirements or limitations on jurisdiction. *Weinberger* v. *Salfi, supra*; *Zahn* v *International Paper Co.*, 414 U.S. 291 (1973). The court of appeals decision permits backdoor access to the court through a Rule 23 class action or intervention under Rule 24, although, as here, the front door has been held to be closed. We understand Rule 82 to expressly forbid such a result and this Court's decision in *United States* v. *Sherwood*, 312 U.S. 584 (1941), underscores that bar. Respondents' claim to intervene must be to protect a direct right to relief (*see* Rule 24) which the court below held *they did not have*. Such a theory is the kind of "artful pleading" which this Court specifically rejected in *Brown* v. *GSA*, *supra*, in language equally applicable here:

> [Section] 717 does not contemplate merely judicial relief. Rather, it provides for a careful blend of administrative and judicial enforcement powers. Under the petitioner's theory, by perverse operation of a type of Gresham's law, § 717, with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were

> immediate access to the courts under other, less demanding statutes permissible. The crucial administrative role that each agency together with the Civil Service Commission was given by Congress in the eradication of employment discrimination would be eliminated "by the simple expedient of putting a different label on [the pleadings." *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-490 (1973). It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading [425 U.S. at 833].

Finally, section 717 expressly provides that, in any civil action brought thereunder, "the head of the . . . agency . . . *shall* be the defendant." In *Brown* v. *GSA*, *supra*, this Court determined that the section was both "exclusive and pre-emptive." The Fifth Circuit gave no reasons for reversing the district court judgment in favor of the petitioners who were not the "head" of TVA, or for assessing costs against them. Neither did it explain how section 717 authorizes money judgments against them. The decision is not only contrary in principle to *Brown*, but also conflicts with the decision of the District of Columbia Circuit in *Hackley* v. *Roudebush*, 520 F.2d 108, 115 n.17 (1975). The district court cases are also opposed. *E.g.*, *Brooks* v. *Brinegar*, 391 F. Supp. 710, 711 (W.D. Okla. 1974); *Jones* v. *Brennan*, 401 F. Supp. 622, 627 (N.D. Ga. 1975).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Frank L. EASTLAND, Individually and on behalf of all others similarly situated, et al., Plaintiffs-Appellants,

v.

TENNESSEE VALLEY AUTHORITY et al., Defendants-Appellees.

No. 75-1855.

United States Court of Appeals, Fifth Circuit.

Feb. 28, 1977.

Employees of Tennessee Valley Authority brought employment discrimination suit under the Equal Employment Opportunity Act of 1972, the Civil Rights Act of 1866, and the Fifth Amendment. The United States District Court for the Northern District of Alabama, J. Foy Guin, Jr., J., 398 F.Supp. 541, granted summary judgment against all employees except two, held that review of the claim presented by those two employees would be limited to the administrative record, and held that a class action could not be maintained. Employees appealed. The Court of Appeals, Thornberry, Circuit Judge, held that the Equal Employment Opportunity Act of 1972 could be applied to employees who had administrative claims pending at the time that Act became effective, but not to employees who did not; that the requirement that employees file suit within 30 days after receipt of the Civil Service Commission's final administrative decision was jurisdictional; that neither the Civil Rights Act of 1866, nor the Fifth Amendment provided a remedy for discrimination in federal employment; and that federal employees could maintain a class action under the Equal Employment Opportunity Act of 1972 and it was not necessary for unnamed members of the class to exhaust their administrative remedies as a prerequisite to class membership.

Reversed and remanded.

1. Civil Rights ⇐2

Equal Employment Opportunity Act of 1972 was applicable to federal employees who had administrative claims pending on effective date of Act, but federal employees who had received final determination or who had abandoned their administrative claim prior to effective date were not entitled to benefits of Act. Civil Rights Act of 1964, § 717 as amended 42 U.S.C.A. § 2000e-16.

2. Civil Rights ⇐40

Under Equal Employment Opportunity Act of 1972, requirement that federal employee file suit within 30 days of receipt of final decision of Civil Service Commission was jurisdictional and was not abrogated by Commission regulation requiring that complainants who had right to sue be notified of that right in connection with any final decision. Civil Rights Act of 1964, § 717(c) as amended 42 U.S.C.A. § 2000e-16(c).

3. Civil Rights ⇐38

Federal employees bringing job discrimination suit under Equal Employment Opportunity Act of 1972 had same right to trial de novo in district court as was enjoyed by private sector employees. Civil Rights Act of 1964, § 717 as amended 42 U.S.C.A. § 2000e-16.

4. Federal Civil Procedure ⇐2471, 2542

Formal issues framed by pleadings are not determinative on motion for summary judgment and evidentiary matter may be developed, showing that party moved against has presented genuine issues of material fact.

5. Federal Civil Procedure ⇐1261

Discovery rules should be liberally construed, particularly in title VII cases where procedural technicalities should not impede vindication of guaranteed rights. Civil Rights Act of 1964, § 717 as amended 42 U.S.C.A. § 2000e–16.

6. Civil Rights ⇐2
Constitutional Law ⇐253(2)

Neither Civil Rights Act of 1866, nor Fifth Amendment afforded remedy to federal employees complaining of discrimination. 42 U.S.C.A. § 1981; U.S.C.A.Const. Amend. 5.

7. Federal Civil Procedure ⇐184

Federal employees could maintain class action under Equal Employment Opportunity Act of 1972 and it was not necessary for unnamed members of class to exhaust their administrative remedies as prerequisite to class membership. Fed.Rules Civ.Proc. rules 23, 23(a), (b)(2), 28 U.S.C.A.; Civil Rights Act of 1964, § 717 as amended 42 U.S.C.A. § 2000e–16.

8. Federal Civil Procedure ⇐184

In class action under Equal Employment Opportunity Act of 1972, only issues that may be raised are those issues that were raised by representative parties in their administrative complaints. Fed.Rules Civ.Proc. rules 23, 23(a), (b)(2), 28 U.S.C.A.; Civil Rights Act of 1964, § 717 as amended 42 U.S.C.A. § 2000e–16.

Appeal from the United States District Court for the Northern District of Alabama.

Before THORNBERRY, SIMPSON and MORGAN, Circuit Judges.

THORNBERRY, Circuit Judge:

The original complaint in this case was filed on May 21, 1973, by Frank L. Eastland under § 717 of the Civil Rights Act of 1964, as amended by § 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e–16, the Civil Rights Act of 1866, 42 U.S.C. § 1981, and the Fifth Amendment of the United States Constitution. In addition to allegations of discrimination against him in his individual capacity, Eastland's complaint requested relief on behalf of ". . . all past, present, and future black employees and applicants for employment in TVA's Muscle Shoals, Alabama area operations and facilities, and all black persons who would apply or would have applied for employment in said operations but for the defendant's racially discriminatory recruitment and employment practice or reputation therefor." District Court Record at 2. The original complaint requested broad injunctive relief and monetary compensation for black employees and applicants. On October 13, 1973, an amended complaint was filed that added eleven named plaintiffs[1] and two additional defendants.[2] In its amended findings of fact and conclusions of law entered on December 31, 1974, the United States District Court for the Northern District of Alabama (1) granted summary judgment against all of the named plaintiffs except Eastland and Sheffield; (2) held that review of the claim presented by Eastland and Sheffield would be limited

1. Louis J. Sheffield, Andrew V. Oates, Sam Cohen, Jr., Houston T. Fuqua, Melvin M. Puryear, Thomas Vinson, William N. James, Isiah Fitzgerald, John B. Ricks, Robert H. Nash, Robert Littleton, Jr.

2. Tennessee Valley Trades and Labor Council and the Salary Policy Employee Panel.

to the administrative record; and (3) held that a class action could not be maintained because class actions are unavailable where the scope of review is limited to the administrative record and because the class claims were not presented at the administrative level. Certification under 28 U.S.C. § 1292(b) was granted on June 5, 1975 on all questions of law and fact involved in the case except those related to the individual claims of appellant Eastland.

The following questions are before this court: (1) whether the district court properly granted summary judgment against all named plaintiffs except Eastland and Sheffield for failure to exhaust their administrative remedies under § 717 of the Civil Rights Act of 1964; (2) whether appellants may maintain an action alleging employment discrimination under 42 U.S.C. § 1981 in addition to their claim based on Title VII; (3) whether the district court erred in granting summary judgment against appellant Sheffield on the basis of his administrative record; (4) whether appellants were entitled to de novo review of their Title VII claims; and (5) whether appellants should be allowed to maintain a class action.

I.

As previously mentioned, twelve persons were named as plaintiffs in appellants' amended complaint. The district court held that appellants Eastland and Sheffield had exhausted their administrative remedies and were properly before the court. Summary judgment was granted against the ten remaining plaintiffs-appellants for failure to exhaust administrative remedies, failure to file suit within the thirty-day time period for filing suits after notice of final action on their federal employment discrimination complaints, and because § 717 of the Civil Rights Act of 1964 is not retroactive. In order to facilitate discussion, appellants will be divided into groups according to the time when they brought their original administrative complaints.

Appellants Nash, Ricks, and Littleton all filed their claims and either received final agency determination or abandoned the administrative process prior to the time that the 1972 Amendments to the Civil Rights Act of 1964 became effective.[3] Although these appellants concede that they do not have independent standing to maintain an action under § 717, they contend that they are still proper plaintiffs in this lawsuit, because of their status as unnamed members of the class alleged in the original and amended complaints. The district court, however, granted summary judgment against these plaintiffs because their claims were determined before the 1972 Amendments became effective.[4]

3. Nash filed a formal complaint on September 19, 1969. This complaint was abandoned in favor of a civil action, and his action was dismissed for failure to exhaust on October 12, 1970.

Ricks filed an administrative complaint on September 8, 1971. This complaint was withdrawn when Ricks was granted a promotion on October 31, 1971.

Littleton filed a complaint on February 6, 1970. After an adverse decision was rendered, Littleton appealed to the Civil Service Commission Board of Appeals and Review which affirmed the initial decision on April 5, 1971.

The 1972 Amendments to the 1964 Civil Rights Act became effective on March 24, 1972.

4. "These plaintiffs cannot now come into federal court on their amended complaint since their claims had already been determined before amended Title VII became effective." Amended Findings of Fact and Conclusions of Law, District Court Record at 307.

[1] We agree with the district court's determination that the 1972 Amendments should not be applied to plaintiffs who did not have administrative claims pending at the time that the 1972 Amendments became effective. While the Supreme Court has indicated in a footnote that the 1972 Amendments may be retroactively applied to employees who had administrative complaints pending at the time the Amendments became effective,[5] there is no authority for the proposition that federal employees who have received a final determination or have abandoned their administrative claim prior to March 24, 1972 are entitled to the same treatment. We hold that appellants Ricks, Nash, and Littleton had no substantive rights under the 1972 Amendments to Title VII since they did not have administrative claims pending on March 24, 1972, and that the district court did not err in granting summary judgment against them.

The second group of named plaintiffs that the district court granted summary judgment against is composed of appellants Vinson, Oates, Cohen, Fuqua, and Puryear. These appellants filed a joint claim with TVA on June 18–20, 1971. An adverse ruling was rendered on August 1, 1972. Their appeal to the United States Civil Service Commission Board of Appeals and Review was resolved against them on December 19, 1972. These five persons were named as plaintiffs in the amended complaint, which was filed on October 19, 1973, approximately ten months after the Civil Service Commission Board of Appeals and Review rendered its final decision. The district court granted summary judgment against this group of plaintiffs because their complaint was not filed within thirty days of the final decision of the Civil Service Commission Board of Appeals and Review,[6] and on the ground that the 1972 Amendments should not be retroactively applied to claims pending on the effective date.[7]

As previously discussed, we feel that § 717 is applicable to administrative claims pending on March 24, 1972, the date that the 1972 Amendments to Title

5. The Second Circuit in *Brown v. GSA*, 507 F.2d 1300 (2 Cir. 1974), held that the 1972 Amendments to Title VII may be retroactively available to federal employees who had claims pending on March 24, 1972. In its decision in the same case, the Supreme Court allowed the Second Circuit's holding on retroactivity to stand:

> The Court of Appeals for the Second Circuit affirmed the judgment of dismissal. *Brown v. GSA*, 507 F.2d 1300 (1974). It held, first, that the section 717 remedy for federal employment discrimination was retroactively available to any employee, such as the petitioner, whose administrative complaint was pending at the time section 717 became effective on March 24, 1972.[4]

[4] The parties have apparently acquiesced in this holding by the Court of Appeals, and we have no occasion to disturb it.
Brown v. GSA, 425 U.S. 820, 824, 96 S.Ct. 1961, 1964, 48 L.Ed.2d 402 (1976).

6. 42 U.S.C. § 2000e–16(c) requires federal employees who are aggrieved by the final disposition of their complaints to file suit in federal district court within thirty days of receipt of Notice of Final Action by their government agency or by the Civil Service Commission if they have appealed from a decision of their respective agency to the Civil Service Commission Board of Appeals and Review.

7. "This court is of the opinion that said amended complaints are untimely both under § 717 of the Amended Civil Rights Act of 1964, 42 U.S.C. § 2000e–16 (Supp. II, 1972), and under the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970). In addition, this court finds that the amended Title VII is not to be retroactively applied." Amended Findings of Fact and Conclusions of Law, District Court Record at 308.

VII became effective. Since appellants Vinson, Oates, Cohen, Fuqua, and Puryear had an administrative claim outstanding on the effective date, we hold that they had the right to file a civil action in federal court for a period of thirty days after the Civil Service Commission notified them of its final action on their claim. Unfortunately for this group of appellants, they failed to file their complaint in the district court within the thirty-day period. Indeed, it is undisputed that appellants' amended complaint was not filed until approximately ten months after the Civil Service Commission's final decision was rendered. In addition, the Civil Service Commission's final decision failed to notify them of their right to bring suit in federal district court. The question that must therefore be resolved is whether the thirty-day period for filing suit in district court provided by 42 U.S.C. § 2000e–16(c) should be measured from the time that notice of the Commission's final decision is received, or from the time that notice of the right to file a civil action is received by the employee.

[2] Appellants contend that the notice sent to them by the Civil Service Commission was defective under the Commission's own regulations, which require that complainants who have a right to sue be notified of that right in connection with any final decision. 5 C.F.R. §§ 713.234, 713.282.[8] Appellants believe that their rights were timely invoked by plaintiff Eastland when he filed the original class action complaint within thirty days of the Civil Service Commission's decision in his case. Unfortunately, the resolution of this issue is not as simple as appellants Vinson, Oates, Cohen, Fuqua, and Puryear contend.

The Third Circuit and the District of Columbia Circuit have determined that the thirty-day limitation period does not run where the notice sent to the complainant failed to advise him of the limitation period. *Allen v. United States*, 542 F.2d 176 (3 Cir. 1976); *Coles v. Penny*, 531 F.2d 609 (D.C.Cir.1976). But because we find the thirty-day limit to be jurisdictional, in accordance with the legislative history of the 1972 Amendments to Title VII and with private sector cases, we part company with those circuits and hold that these appellants' actions are barred.

In presenting to the Senate the 1972 Amendments to Title VII, Senators Williams and Javits stated:

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed would continue to govern the applicability and construction of Title VII.

118 Cong.Rec. S 7166 (daily ed. March 6, 1972). This policy was reflected in *Parks v. Dunlop*, 517 F.2d 785, 787 (5 Cir. 1975), where this court announced that Congress intended to extend to federal employees the same Title VII rights enjoyed by private sector employees. We have found no federal sector cases dealing with whether the thirty-day time limit is jurisdictional. Neither do we glean from the statute any indication that this time limit should assume a

8. The relevant portion of § 713.234 provides, "The decision of the Board is final, but shall contain a notice of the right to file a civil action in accordance with § 713.282."

Section 713.282 states that, "An agency shall notify an employee or applicant of his right to file a civil action, and of the thirty day time limit for filing, in any final action on a complaint under § 713.234."

character different from that of the private sector ninety-day statutory limit set forth in 42 U.S.C. § 2000e–5(f)(1). Several cases have held that time limit to be jurisdictional: the courts cannot hear Title VII cases brought after the lapse of the prescribed time. *See, e. g., Genovese v. Shell Oil Co.*, 488 F.2d 84 (5 Cir. 1973); *Archuleta v. Duffy's Inc.*, 471 F.2d 33 (10 Cir. 1973); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357 (7 Cir. 1968). In absence of authority in the federal sector to the contrary, we hold that the thirty-day limitation set forth in 42 U.S.C. § 2000e–16(c) is also a jurisdictional requirement. The question then is whether the Civil Service Commission's regulations, which provide for notification of the right to sue in connection with any final Civil Service Commission decision, should override the jurisdictional requirement that suit be filed in the district court within the thirty-day statutory limitation set forth in 42 U.S.C. § 2000e–16(c). We hold that they do not. The Second Circuit was confronted with a similar situation in the private sector case of *Dematteis v. Eastman Kodak*, 511 F.2d 306, *modified on rehearing*, 520 F.2d 409 (2 Cir. 1975). One of the issues in *Dematteis* was whether the limitation period set forth in 42 U.S.C. § 2000e–5(f)(1) began to run from receipt of notice of the Equal Employment Opportunity Commission's determination that there was not reasonable cause to believe that the charge was true and the dismissal of the charge, or from the later receipt of notice of right to sue. Similar to statutory authority in the federal sector, 42 U.S.C. § 2000e–5(b) provides a limitation on the time for bringing actions in the district court and no reference is made to notification of the right to sue;[9] in addition, a regulation promulgated by the Equal Employment Opportunity Commission, 29 C.F.R. § 1601.25(a)(3) states that notice of the right to sue will be given in connection with notice of the termination of administrative proceedings.[10] After taking notice of the fact that the ninety-day limitation in subsection (f)(1) was jurisdictional, the court ruled that to allow it to run from the time that notice of right to sue was received would result in the expansion of the jurisdiction of federal courts by a regulation of an administrative agency, which was improper. We believe that the instant case presents an analogous situation. As appellees point out, 42 U.S.C. § 2000e–16(b) does not require the Civil Service Commission to notify federal employees of their right to sue; it is only required to notify them of any final action taken on their complaints.[11] It is also true that if final action by the Civil Service Commission has not been taken

9. "If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action." 42 U.S.C. § 2000e–5(b).

10. "Any instance in which the Commission is unable to attain voluntary compliance as provided by Title VII, as amended, it shall so notify the respondent, the person filing the charge on behalf of the aggrieved person, the aggrieved person or persons, and any state or local agency to which the charge has been previously heard pursuant to § 1601.12 or § 1601.10. Notification to the aggrieved person shall include: advice concerning his or her right to proceed in court under § 706(f)(1) of Title VII." 29 C.F.R. § 1601.25(a)(3).

11. "The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that the employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder." 42 U.S.C. § 2000e–16(b).

within 180 days after the administrative complaint was filed, the complainant may file suit without any notice.[12] We feel that to replace the notice required by 42 U.S.C. § 2000e–16(c) with the notice specified in the Civil Service Commission's own regulation, 5 C.F.R. §§ 713.234, 713.282, would be an improper extension of the jurisdiction of the federal courts by an administrative agency. *Dematteis v. Eastman Kodak, supra* at 311; *but see Coles v. Penny*, 531 F.2d 609, 616–617 (D.C.Cir.1976). This we decline to do. Accordingly, the portion of the district court's decision granting summary judgment against appellants Vinson, Oates, Cohen, Fuqua, and Puryear is affirmed. In so holding, however, we express no intention to invalidate the Civil Service Commission regulations. her, we say here only that the agency's failure to tell complainants of their right to file a court action in thirty days, while unwise, does not lift the jurisdictional bar lowered thirty days after notification of final agency action taken.

Although appellant Fitzgera'd did not initiate an administrative claim along with appellants Vinson, Oates, Cohen, Fuqua, and Puryear, we feel that he is similarly situated. Fitzgerald filed a complaint with TVA on July 24, 1972, and received notice of an adverse ruling on February 5, 1973. His amended complaint was not filed in the district court until October 9, 1973, far beyond the thirty-day limitation set forth in 42 U.S.C. § 2000e–16(c). Since the commencement of an action in federal district court within thirty days is a jurisdictional fact,[13] the district court properly granted summary judgment against Fitzgerald for failure to comply with this time limitation.

[3–5] It is undisputed that appellant James filed a timely claim for relief in the district court. The district court's amended order and final judgment dated December 31, 1974, states that summary judgment is granted against James for failure to exhaust administrative remedies. This is clearly incorrect since it is undisputed that James exhausted the administrative process and filed a timely claim in the district court. On the other hand, the district court's Conclusions of Law state that summary judgment was granted against James because he failed to show any genuine issue of material fact. This decision of the district court appears to have been based on a review of James' administrative record. In view of the Supreme Court's recent decision in *Chandler v. Roudebush*, 425 U.S. 840, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976), holding that federal employees alleging job discrimination violative of the 1972 Amendments of Title VII, 42 U.S.C. § 2000e–16, have the same right to a trial de novo in federal district court as is enjoyed by private sector employees under the Act, we feel that the district court's decision to grant summary judgment against appellant James was premature. It is entirely possible that if James would have had the use of the discovery provisions of the Federal Rules

12. "Within thirty days of receipt of notice of final action taken by a department, agency, . . . or after 180 days from the filing of the initial charge with the department, agency, . . . an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in § 2000e–5 of this title. . . ." 42 U.S.C. § 2000e–16(c).

13. *See* private sector cases: *Genovese v. Shell Oil Co., supra; Archuleta v. Duffy's Inc., supra; Choate v. Caterpillar Tractor Co., supra.*

of Civil Procedure in a trial de novo before the district court, he might have been able to develop factual issues for trial. The formal issues framed by the pleadings are not determinative on a motion for summary judgment and evidentiary matter may be developed, showing that the party moved against has presented genuine issues of material fact. *See*, Wright & Miller, Federal Practice and Procedure § 2721 (1973). The discovery rules should be liberally construed, *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947); *Schlagenhauf v. Holder*, 379 U.S. 104, 114–115, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964), and we feel that this is especially true in Title VII cases where procedural technicalities should not impede the vindication of "guaranteed rights." *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300, 305 (5 Cir. 1973). The granting of summary judgment against appellant James is therefore reversed and his claim is remanded to the district court for a trial de novo.

II.

[6] In addition to their claim under Title VII, appellants also contend that they are entitled to relief under the Civil Rights Act of 1866, 42 U.S.C. § 1981, and the fifth amendment of the United States Constitution. In *Brown v. GSA*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976), the Supreme Court held that the exhaustion and limitation requirements of § 717 of the Civil Rights Act of 1964 could not be circumvented by bringing federal employment discrimination claims under less demanding statutes such as § 1981.[14] "In the case at bar, as in *Preiser* [*Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439] and the other cases cited above, the established principle leads unerringly to the conclusion that § 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment." 425 U.S. at 835, 96 S.Ct. at 1969. The district court therefore acted properly in granting summary judgment against the appellants on their claims based upon § 1981 and the Fifth Amendment.

III and IV.

Appellant Sheffield contends that the district court erred in granting judgment in favor of the appellees on the basis of his administrative record. The Supreme Court resolved this issue, as well as appellants' contention that the district court erred in refusing to conduct plenary judicial proceedings, when it held that the Civil Rights Act of 1964 as amended by the Equal Employment Act of 1972, 42 U.S.C. § 2000e–16 gives federal employees the same right to a trial de novo in federal district court of employment discrimination claims as private sector employees enjoy.[15] 425 U.S. 820, 96

14. "The balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplant other putative judicial relief. His view fails, in our estimation, to accord due weight to the fact that unlike these other supposed remedies, § 717 does not contemplate merely judicial relief. Rather it provides for a careful blend of administrative and judicial enforcement powers. Under the petitioner's theory, by perverse operation of a type of Gresham's Law, § 717, with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible." 425 U.S. at 832, 96 S.Ct. at 1968.

15. It is interesting to note that the Supreme Court recognized the possibility that allowing federal employees the right to trial de novo in federal district court might ultimately defeat the purposes of the administrative scheme, but felt compelled to grant federal employees the right to de novo review on the basis of legislative history. 425 U.S. at 820, 96 S.Ct. at 1961.

S.Ct. at 1961. This circuit has announced its straight-forward adherence to this rule. *See Oringel v. Mathews*, 534 F.2d 1182 (5 Cir. 1976). We therefore hold that the district court erred in limiting its review of appellant Sheffield's claim to the administrative record. In addition, appellant Eastland should receive a plenary judicial proceeding in the district court.[16]

V.

[7] Appellants' final contention is that the district court erred in refusing to allow them to maintain a class action under federal rule 23(b)(2).[17] The district court's decision on this question was based upon its assumption that review was limited to the administrative record and the fact that class claims would not have to be presented at the administrative level.[18] For the following reasons we hold that a class action is permissible under § 717 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–16, and that it is not necessary for unnamed members of the class, as defined by the district court on remand, to exhaust their administrative remedies as a prerequisite to class membership.

As previously mentioned, the Supreme Court has held that federal employees have the same right to a trial de novo in employment discrimination claims as private sector employees enjoy under Title VII. *Chandler v. Roudebush*, *supra*. Although the Supreme Court was not presented with the question of whether class actions are permissible under the 1972 Amendments to the Civil Rights Act of 1964, we believe that the right to bring a class action is concomitant to the right to de novo proceedings in the district court. There is nothing in the 1972 Amendments that indicates that class actions are not permissible.[19] When con-

16. The district court issued certification under 28 U.S.C. § 1292(b) on June 5, 1975, with respect to all issues in the action except Eastland's individual claims, which were remanded to the Civil Service Commission for supplementation of his administrative record.

17. Appellants' amended complaint seeks injunctive relief on behalf of all past, present, and future black employees or applicants for employment in TVA's Muscle Shoals, Alabama area operations and facilities. Subdivision (b)(2) of Fed.R.Civ.P. 23 is designed for situations where a party has taken action or refused to take action with respect to a class, and relief of injunctive or declaratory nature is appropriate for the class as a whole.

18. "Several recent decisions have stated that class 'actions are unavailable as a matter of law where the function of the court is limited to review of the administrative record.'

* * * * * *

"In addition, this court has already pointed out that the exhaustion of the administrative remedies is a jurisdictional requirement. In the present case, these class claims were not presented at the administrative level, thus falling short of the jurisdictional prerequisite. By allowing a class action in this situation, the court would be providing a vehicle to the plaintiffs for bypassing agency determination." Amended Findings of Fact and Conclusions of Law, District Court Record at 312.

19. The relevant portion of 42 U.S.C. § 2000e–16(c) merely states, " . . . an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in § 2000e–5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant." 42 U.S.C. § 2000e–16(c). While we have found no cases

fronted with this question in a suit filed by an employee in the private sector, this court held that a class action was permissible. *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5 Cir. 1968). We feel that the rationale of the court in *Oatis v. Crown Zellerbach Corp., supra*, is applicable in the federal sector, and that it would be wasteful for numerous employees with the same grievance to individually exhaust their administrative remedies under § 717 before bringing suit in the district court:

> "Racial discrimination is by definition class discrimination, and to require a multiplicity of separate, identical charges before the EEOC, filed against the same employer, as a prerequisite to relief through resort to the court would tend to frustrate our system of justice and order."

398 F.2d at 499. Not only will permitting federal employees to maintain class actions under § 717 place them on a parity with employees in the private sector, it will also effectuate the purpose of Rule 23 by allowing a procedural grouping of plaintiffs who are similarly situated.

[8] Naturally, a class action may only be maintained if the requirements of Rule 23(a) and Rule 23(b)(2) can be complied with, and the only issues that may be raised are those issues that were raised by the representative parties in their administrative complaints. *Oatis v. Crown Zellerbach Corp.*, 398 F.2d at 499. We express no opinion on the question of whether the maintenance of a class action is proper in the case at hand; rather, our holding is limited to a reversal of the district court's Conclusion of Law stating that class actions are not as a general rule permissible under the 1972 Amendments to the Civil Rights Act of 1964.[20] On remand, the district court is directed to conduct a hearing to determine whether maintenance of a class action under Rule 23(a) and Rule 23(b)(2) is proper.[21]

REVERSED AND REMANDED.

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holding directly that this section permits class actions, several courts have assumed that the statute does allow such actions. *See, e. g., Simmons v. Schlesinger*, — F.2d — (4 Cir. 1976); *Hackley v. Roudebush*, 171 U.S.App. D.C. 376, 520 F.2d 108 (1975); *Thompson v. Roudebush*, No. 74-C-3719 (N.D.Ill., Oct. 12, 1976); *Keeler v. Hills*, 408 F.Supp. 386 (N.D. Ga.1975); *Ellis v. Naval Air Rework Facility*, 404 F.Supp. 391 (N.D.Cal.1975); *Sylvester v. United States Postal Service*, 393 F.Supp. 1334 (S.D.Tex.1975); *Barrett v. United States Civil Service Comm'n*, 69 F.R.D. 544 (D.D.C.1975); *Richerson v. Fargo*, 61 F.R.D. 641 (E.D.Pa. 1974).

20. "Plaintiffs also assert that they may bring a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. It is the opinion of this court that the class action must be denied."

> "In the present case, these class claims were not presented at the administrative level, thus falling short of the jurisdictional prerequisite. By allowing a class action in this situation, the court would be providing a vehicle to plaintiffs for bypassing agency determination." Amended Findings of Fact and Conclusions of Law, District Court Record at 312.

21. The fact that we have held that appellants Vinson, Oates, Cohen, Puryear, Fuqua, Fitzgerald, Ricks, Nash, and Littleton are not properly before the court as named plaintiffs does not mean that they are precluded from participating in this lawsuit as unnamed members of the class described in appellants' complaint. Whether or not these persons are proper members of the class is an issue to be determined by the district court if it decides that the requirements of Rule 23(a) and 23(b)(2) have been complied with.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

Frank L. EASTLAND, Individually, and on behalf of all others similarly situated, et al., Plaintiffs-Appellants,

v.

TENNESSEE VALLEY AUTHORITY et al., Defendants-Appellees.

No. 75-1855.

United States Court of Appeals, Fifth Circuit.

May 23, 1977.

Appeal from the United States District Court for the Northern District of Alabama, J. Foy Guin, Jr., Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Feb. 28, 1977, 5 Cir., 1977, 547 F.2d 908).

Before THORNBERRY, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM:

We hereby modify our opinion in this cause in the following particulars:

1. Add the following paragraphs to the end of footnote 13 on slip opinion page 1750, 547 F.2d on page 914:

"The affirmance of summary judgment against appellants Vinson, Oates, Cohen, Fuqua, Puryear, and Fitzgerald comports fully with the notions of prospectivity set out in *Zambuto v. American Tel. & Tel. Co.*, 544 F.2d 1333 (5 Cir., 1977), and in the rehearing in *DeMatteis v. Eastman Kodak Co.*, 520 F.2d 409 (2d Cir. 1975). Those two private sector Title VII cases held that a plaintiff's failure to file a civil action within thirty days of notification of final agency action bars the civil action, but the courts there declined to dismiss the petitions of the plaintiffs on those particular grounds.

In *Zambuto*, a panel of this court found that the notice of final action sent by the EEOC misled the plaintiff as to the time at which the thirty days began to run. The notice stated that notice of right to sue would be issued on request. This language affirmatively misled this plaintiff by representing implicitly that the thirty days would not start to run until after the notice of right to sue was requested. 544 F.2d at 1335.

The *DeMatteis* rehearing involved the petitioner's (plaintiff's) new assertion that the EEOC had informed him that notice of right to sue would be issued upon request. This constituted a change from the record before the court when it wrote the opinion in chief—the record had then indicated that the EEOC notice made no mention of a right to sue notice. On rehearing, defendant disputed the plaintiff's change in allegations. In light of these conflicting representations, the court remanded the case to district court to resolve the question of which notice was received by the plaintiff. In doing so, the court made it plain that if the notice was as represented by plaintiff on rehearing, the bar erected by the ninety day limitation was to be applied prospectively only, since plaintiff did, in fact, file his civil action within ninety days of receipt of the notice of right to sue. 520 F.2d at 410, 411.

The present case does not present that pattern of affirmatively misleading representations as to the time allowed for suit. Here, the agency sent no notice of the right to sue. Appellants' ground for avoiding the thirty day limit of § 717 is that the failure to send such a notice violated Civil Service Commission regu-

lations, even though they received notice of final agency action. *DeMatteis* and *Zambuto* do not reach the situation presented here, where the agency makes no affirmative misleading representations."

2. In Part II of the opinion, on page 1751, 547 F.2d on page 915, in the right hand column, last line of the first paragraph, delete "and the Fifth Amendment."

3. Delete the fifth through eighth lines of the first full paragraph in the right hand column of page 1753, 547 F.2d of page 916, and substitute the following: "be raised are those issues that were raised by representative parties in their administrative complaints, together with those issues that may reasonably be expected to grow out of the administrative investigation of their claims. *See Gamble v. Birmingham Southern RR.*, 514 F.2d 678 (5 Cir. 1975);* *Danner v. Phillips Petrol. Co.*, 447 F.2d 159 (5 Cir. 1971); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 458 [455] (5 Cir. 1970); *Johnson v. Georgia Hwy. Express*, 417 F.2d 1122 (5 Cir. 1969); *Oatis v. Crown Zellerbach Corp., supra*."

4. Add the following paragraph to the end of footnote 21 on page 1753, 547 F.2d on page 916:

"Upon determining that a class action is available and proper under Rule 23, the district court may allow these plaintiffs to intervene. We leave that question for resolution in the district court. *See Calhoun v. Cook*, 487 F.2d 680 (5 Cir. 1973); *Gabriel v. Standard Fruit and Steamship Co.*, 448 F.2d 724 (5 Cir. 1971). *Compare Oatis v. Crown Zellerbach Corp., supra* (nonexhausting plaintiffs allowed to remain as named parties after the court determined that a class action was proper)."

In all other respects, the Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is DENIED.

Appellants are to bear one-third of their costs and appellees are to bear their own costs and two-thirds of appellants' costs.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHWESTERN DIVISION

Filed
Dec. 31, 1974

FRANK L. EASTLAND, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL
	)	ACTION NO.
	)	73-G-487-NW
TENNESSEE VALLEY AUTHORITY, et al.,	)	
	)	
	)	
Defendants.	)	

AMENDED ORDER AND FINAL JUDGMENT

The Order and Final Judgment heretofore entered in the above-styled case on September 30. 1974, is hereby amended by the following:

In conformity with and pursuant to the Amended Findings of Fact and Conclusions of Law filed contemporaneously herewith, it is:

ORDERED, ADJUDGED and DECREED that plaintiff's motion for a trial *de novo* be and the same hereby is denied.

It is FURTHER ORDERED that defendants' motion for summary judgment for failure to exhaust administrative remedies is hereby granted as to all of the plaintiffs' individual claims, except plaintiffs Eastland and Sheffield, whose review will be limited to the administrative record certified to this court.

It is FURTHER ORDERED that plaintiffs are presently unable to maintain a class action.

DONE this the 31st day of December, 1974.

s/ J. Foy Guin, Jr.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHWESTERN DIVISION

Filed
Dec. 31, 1974

FRANK L. EASTLAND, et al.,

Plaintiffs,

vs.

TENNESSEE VALLEY AUTHORITY, et al.,

Defendants.

CIVIL ACTION NO. 73-G-487-NW

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Findings of Fact and Conclusions of Law heretofore filed in the above-styled case on September 30, 1974, and amended on October 11, 1974, are further amended by the following:

FINDINGS OF FACT

1. On May 21, 1973, plaintiff Frank L. Eastland filed his complaint for an injunction against racial discrimination, for hiring, training and promoting sufficient numbers of blacks to overcome the effects of past discrimination; and for m etary compensation for losses suffered through the alleg acial discrimination.

Plaintiff seeks to enforce the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261, March 24, 1972); the Civil Rights Act of 1866, 42 U.S.C. §1981; Executive Order 11478, 34 F.R. 12985; and the fifth amendment to the United States Constitution.

2. Plaintiff Eastland was an applicant for employment as an airplane (helicopter) pilot with the Division of Property and Supply of the Tennessee Valley Authority, a corporation wholly owned by the government of the United States.

3. Plaintiff was not appointed to the position to which he had applied. He initiated a formal administrative complaint of racial discrimination with the T.V.A.'s Office of Equal Employment Opportunity on May 1, 1972, pursuant to 42 U.S.C. §2000e-16(a) and Executive Order 11478. He was notified of an adverse ruling on December 20, 1972, and filed an appeal with the Civil Service Commission on December 29, 1972. The Civil Service Commission gave notice of its adverse ruling on April 19, 1973. Plaintiff Eastland filed this action with the United States District Court, Northern District of Alabama, on May 21, 1973.

4. The original complaint was amended October 9, 1973, to include the addition of plaintiffs: Louie J. Sheffield, Andrew V. Oates, Sam Cohen, Jr., Houston T. Fuqua, Melvin M. Puryear, Thomas Vinson, William N. James, Isiah Fitzgerald, John B. Ricks, Robert H. Nash, and Robert Littleton, Jr., all black employees of T.V.A., to the class action complaint of plaintiff Eastland.

5. The complaint was further amended on October 9, 1973, to add the T.V.A. Trades and Labor Salary Policy Employee Panel as party defendant.

6. Plaintiff John B. Ricks complained of a denial of training and promotion in favor of persons with less seniority and education. He was promoted shortly thereafter, and on August 12, 1971, officially withdrew his complaint.

7. Plaintiff Robert H. Nash filed an administrative complaint in 1969. There was an adverse ruling. He filed a court action to review the correctness of the administrative determination. His action was dismissed with full prejudice on April 14, 1972.

8. Plaintiff Robert Littleton, Jr., claimed racial discrimination by a T.V.A. physician who imposed a medical restriction for a congenital abnormality in his spine which resulted in plaintiff's removal from the boilermaker's apprentice program. A hearing was conducted on September 1, 1970, with the T.V.A.'s Office of Equal Employment Opportunity. The final agency decision was rendered on October 29, 1970, denying the relief sought. Timely appeal was made to the United States Civil Service Commission Board of Appeals and Review, which affirmed the final decision on April 5, 1971. No further action was taken by plaintiff Littleton.

9. Plaintiff Isiah Fitzgerald was employed by T.V.A. in the processing and technical section. Plaintiff Fitzgerald complained that he had been promoted to a higher-paying class "A" job on a temporary basis, when a permanent-nature advancement was warranted, and that he had been subsequently returned to a permanent

class "B" position. Furthermore, during this period white non-veterans were given training and promotion opportunities which were denied to him. His initial complaint was filed July 24, 1972. Plaintiff waived a formal hearing and requested a review of the administrative file. On February 5, 1973, a finding that the evidence did not support the claim was rendered. No further action was attempted.

10. Plaintiff Louie J. Sheffield, on March 3, 1973, filed a complaint of racial discrimination with the Muscle Shoals office of T.V.A.'s Office of Equal Employment Opportunity, alleging a failure to be promoted or reclassified due to racial discrimination. Plaintiff Sheffield was promoted following the lifting of an administrative "freeze" on promotions. He waived a hearing in favor of a review of the administrative record, which was decided adversely to plaintiff on September 28, 1973, expressly denying plaintiff Sheffield's claims of racial discrimination prior to 1969, as such actions were beyond the period of review allowed by Equal Employment Opportunity Commission regulations. No appeal was taken with the United States Civil Service Commission Board of Appeals and Review.

11. Plaintiff William N. James filed his administrative complaint on August 22, 1973, alleging three separate claims of racial discrimination. His first claim was rejected since it related to a labor grievance he had initiated earlier and in which his claim had been refused. His second claim was ruled moot on August 22, 1973. His final claim was barred by *res judicata* since he had litigated a similar claim in 1972.

12. Plaintiffs Andrew V. Oates, Sam Cohen, Jr.,

Houston T. Fuqua, Melvin M. Puryear, and Thomas Vinson were employees of the phosphate branch of T.V.A.'s Division of Chemical Operations, whose administrative complaints were processed, investigated and decided as a group. The initial filing was on June 18, 1971, alleging failure of promotion and denial of training opportunities as a result of racial discrimination. The plaintiffs waived a hearing in favor of a review of the administrative record by the T.V.A. Director of Equal Employment Opportunity. A final agency order dated August 1, 1972, denied relief, as the evidence did not support the claim. Timely appeal was made to the United States Civil Service Commission Board of Appeals and Review, which affirmed the T.V.A. decision on December 19, 1972.

As their initial administrative complaint, filed under Executive Order 11478, was prior to the 1972 amendment to Title VII of the Civil Rights Act of 1964, it is plaintiffs' contention that the Civil Service Commission was under an affirmative duty to inform the plaintiffs of their statutory right to appeal to the district court following notice of final agency action. As a result of the Civil Service Commission's failure to give notice, the plaintiffs claim that they relied to their detriment in not further exhausting their administrative remedies.

13. Throughout the administrative process, each plaintiff certified his own administrative complaint, and it was not until this appeal to the United States District Court that any attempt was made to certify a class action suit.

14. Defendants Tennessee Valley Authority, Aubrey J. Wagner, and Dr. Louis B. Nelson moved for dismissal, or

in the alternative for summary judgment.

15. Defendant T.V.A. Trades and Labor Salary Policy Employee Panel is composed of five organizations representing certain T.V.A. salaried employees, and is recognized by T.V.A. as the collective bargaining agent for T.V.A. employees. Defendant T.V.A. Trades and Labor Salary Policy Employee Panel moves to dismiss for failure to state a claim upon which relief can be granted and for summary judgment; misjoinder of parties; failure to state proper grounds for a class action.

CONCLUSIONS OF LAW

1. This action was brought pursuant to the Equal Employment Opportunity Act of 1972, 86 Stat. 103 (1972), 42 U.S.C. §2000e *et seq.* (Supp. II 1972) which makes Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. §2000e *et seq.*, as amended, applicable to the federal government. In the alternative, plaintiffs seek relief under the Civil Rights Act of 1866, 42 U.S.C. §1981, as implemented by Executive Order 11478 and the fifth amendment to the United States Constitution. Plaintiffs are ten black employees of the Tennessee Valley Authority (hereinafter T.V.A.) and two black applicants for employment with T.V.A.

2. It has long been established that as a jurisdictional condition precedent to any action in a federal court, a party must exhaust all available administrative remedies. *Chiriaco v. U.S.*, 339 F.2d 588 (5th Cir. 1964). This position was recently reaffirmed by the 5th Circuit in *Penn v. Schlesinger,* 490 F.2d 700 (1974), in which the court cites to its earlier decision of *Beale v. Blount,* 461 F.2d 1133 (5th Cir. 1972):

> We adhere to the time-tested requirement that available administrative remedies be exhausted prior to the institution of a mandamus action. The federal bureaucracy's efforts to police its own practices with respect to discrimination in employment on the basis of race should not be undermined. This would be the predictable effect of sanctioning resort to the federal courts before completion of the administrative review process. 461 F.2d at 1139.

It should also be noted at this point that this court is of the opinion that the administrative remedies established under the Equal Employment Opportunity Act of 1972 may not be disregarded by bringing suit under §1981 of the Civil Rights Act of 1866. The majority opinion in *Penn, supra,* stated that a federal employment discrimination suit cannot be equated with a private sector action under §1981 whereby a plaintiff may bypass his Title VII administrative remedies. Although the Fifth Circuit sitting *en banc* recently reversed its earlier ruling on the basis of Judge Godbold's dissent in the prior case and held that the plaintiffs therein had not been denied the right to available administrative remedies, there is no language contained in that opinion which would negate the earlier holding as regards the issue of exhaustion. *Penn v. Schlesinger,* 497 F.2d 970 (5th Cir. 1974). It appears that this is a sound distinction, considering the scope of the administrative remedies available to a private sector employee as opposed to those available to a federal employee. Also to be considered is the fact that the detailed administrative process for federal employees outlined by Congress in the amended Title VII would be rendered useless if the suit were allowed to proceed under §1981.

3. In the present action, plaintiffs Eastland and Sheffield are the only parties who have completely exhausted their administrative remedies and timely filed their appeal with this court. The remaining ten plaintiffs may be classified into three groups for purposes of convenience and clarity. This classification is based upon the time period during which each of these plaintiffs brought his original administrative complaint.

The first group, including Nash, Ricks and Littleton, filed their claims and received a final agency determination prior to the March 24, 1972, amendment to the 1964 Civil Rights Act. Nash filed his formal complaint on September 19, 1969. However, he chose to abandon the administrative remedies in favor of a civil action against these same defendants. His action was dismissed on October 12, 1970, for failure to exhaust. Plaintiff Ricks filed his administrative complaint on September 8, 1971, claiming that racial discrimination was the reason he had been denied a promotion. Subsequently, on October 31, 1971, a promotion was granted and he terminated his administrative claim. Plaintiff Littleton filed his initial complaint on February 6, 1970. An adverse ruling was rendered on October 29, 1970, and he appealed to the United States Civil Service Commission Board of Appeals and Review, which affirmed the earlier ruling on April 5, 1971. These plaintiffs cannot now come into federal court on their amended complaint since their claims had already been determined before amended Title VII became effective.

The next group includes Vinson, Oates, Cohen, Fuqua, and Puryear, each of whom had claims which were pending at the time the 1972 amendment became effective.

These plaintiffs filed a joint claim on June 18-20, 1971, and received an adverse ruling on August 1, 1972. A timely appeal was made to the United States Civil Service Commission Board of Appeals and Review, which affirmed the earlier ruling on December 19, 1972. The amended complaint of these five plaintiffs was filed on October 19, 1973, over ten months after the final decision concerning the administrative complaint by the Civil Service Commission. This court is of the opinion that said amended complaints are untimely both under §717 of the amended Civil Rights Act of 1964, 42 U.S.C. §2000e-16 (Supp. II, 1972), and under the Civil Rights Act of 1866, 42 U.S.C. §1981 (1970). In addition, this court finds that the amended Title VII is not to be retroactively applied.

Section 717(c) of the amended Civil Rights Act of 1964, 42 U.S.C. §2000e-16(c) (Supp. II, 1972), contains a specific 30-day time period for filing suits after notice of final agency action on a federal employment discrimination complaint. As has been noted by the Supreme Court, such time period is jurisdictional. *Holmbert v. Armbrecht,* 327 U.S. 392, 395 (1946). However, plaintiffs further contend that the Civil Service Commission is under an affirmative duty to give notice of the right to appeal the final agency determination. This contention is simply not supported by the language of the Act. In fact, the only notice requirement stated therein is to the effect that "an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder." 42 U.S.C. §2000e-16(b) (Supp. II, 1972). Indeed, if such final administrative action has not been taken within 180 days after the filing of an administrative complaint, suit may be filed immediately without any notice. 42 U.S.C. §2000e-16(c) (Supp. II, 1972).

Moreover, an equally cogent reason for denying relief to the plaintiffs in this situation can be found in the recent Supreme Court decision of *United States Immig. & Naturalization Serv. v. Hibi,* 414 U.S. 5 (1973). In effect, the rationale of that opinion supports the view that even if the Civil Service Commission was wrong in failing to give notice, such failure cannot create an estoppel against defendant T.V.A. to claim the benefit of the limitation period fixed by Congress. This court is aware that a contra position on this issue was expressed. In *Day v. Weinberger*, 8 EPD ¶ 9646 (D.D.C. 1974), the court stated that the 30-day time limit did not begin to run until the employee received notice of a right to sue. However, the higher authority of *Hibi* must be deemed controlling in the present case in the absence of any distinguishing factors being presented to this court.

It is also the decision of this court that the provisions of the Equal Employment Opportunity Act of 1972, amending Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, are not to be retroactively applied. The Fourth Circuit Court of Appeals and District of Columbia Circuit have granted retroactivity, viewing §717(c) as basically procedural in nature. *Koger v. Ball*, 497 F.2d 702 (4th Cir. 1974) and *Womack v. Lynn*, 8 EPD ¶ 9709 (D.C. Cir. 1974). However, this court feels that the better reasoned position is that expressed by the Sixth Circuit in *Place v. Weinberger*, 497 F.2d 412 (6th Cir. 1974). Before the amendment to Title VII, federal employees were exempted from its coverage. Thus it is difficult to understand how plaintiffs can claim rights under a statute which did not exist when the alleged violation occured. As stated by the Sixth Circuit in the course of its opinion:

> Waivers of sovereign immunity must be strictly construed. *United States v. Sherwood*, 312 U.S. 584, 61 S. Ct. 767, 85 L. Ed. 1058 (1941). Furthermore, a law is presumed to operate prospectively unless there is a clear expression to the contrary. *Hassett v. Welch*, 303 U.S. 303, 58 S. Ct. 559, 82 L. Ed. 858 (1938). An examination of Section 14 and Section 11 of the E.E.O. Act of 1972 indicates that Congress provided that said act "shall be applicable in regard to charges pending before the commission." Thus, Congress clearly intended certain portions of the Act to operate retroactively and so indicated. We therefore conclude that by its silence as to other sections Congress intended such sections to have prospective application only. 497 F.2d at 414.

Further reinforcement for this holding can be found in the Fourth Circuit decision of *Cohen v. Chesterfield Co. School Bd.*, 474 F.2d 395 (4th Cir. 1973). Although the Supreme Court in *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632 (1974), reversed the Fourth Circuit in *Cohen* on the constitutional issue involved, it nonetheless agreed with the rationale by which that court refused retroactivity under the 1972 amendment to Title VII. In pertinent part, the Fourth Circuit stated: "Rules and practices of the defendant in effect when the defendant was exempt from the Equal Employment Opp. Act cannot be a basis for the violation of that act." 474 F.2d at 396 n.1.[1]

Since plaintiffs also demand injunctive relief under 42

[1] Although the Fourth Circuit in *Koger v. Ball*, 497 F.2d 702, 707 (4th Cir. 1969) attempted to distinguish *Cohen* on the ground that a federal employee's "right to be free from racial discrimination does not depend on the 1972 act," this court does not regard that distinction as viable.

U.S.C. §1981 (1970), it is necessary to determine the question of timeliness under this act. When an equitable remedy is sought pursuant to a federally created right, the question of timeliness is determined by laches. *Holmberg v. Armbrecht*, 327 U.S. 392 (1946). It is the opinion of this court that laches should be determined in light of the most nearly analagous statute of limitations. Since this case involves claims by federal employees, against an agency of the federal government and its officials, the most analagous and appropriate statute of limitations is the 30-day period contained in §717(c) of the amended Civil Rights Act of 1964, the only comparable federal act containing a period of limitation. State statutes of limitation are clearly not the appropriate statutes to apply in a federal case when there is an analagous federal statute of limitation. If plaintiffs were allowed to bypass the specific time requirements of §717 merely by bringing suit under §1981, the enactment of the previous section would be a nullity for all practical purposes. The reasoning applied by this court to the exhaustion of administrative remedies issue under §1981 is equally applicable to this decision on timeliness.

The third group is composed of James and Fitzgerald, who filed their complaints after the 1972 amendment became effective. Plaintiff Fitzgerald filed on July 24, 1972, and received notice of an adverse ruling on February 5, 1973. His amended complaint was filed on October 9, 1973. Since this is beyond the 30-day time limitation, the same rationale discussed above would apply here to bar this claim. Plaintiff James filed three separate claims on August 22, 1973. His first claim was rejected since it related to a labor grievance he had initiated earlier and which was subsequently denied. His second claim was ruled moot on August 22, 1973. His final

claim was barred by *res judicata* since he had litigated a similar claim in 1972. Therefore, plaintiff James, though he filed a timely claim for relief, must be denied access to the court and summary judgment granted against him pursuant to Federal Rules of Civil Procedure, Rule 65, as he has failed to show a genuine issue as to any material fact and defendant is entitled to a judgment as a matter of law.

4. Plaintiffs also assert that they may bring a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. It is the opinion of this court that the class action must be denied. Several recent decisions have stated that class actions are unavailable as a matter of law where the function of the court is limited to a review of the administrative record. *Pendleton v. Schlesinger*, 8 EPD ¶ 9598 (D.D.C. 1974); *Spencer v. Schesinger*, 374 F. Supp. 840 (D.D.C. 1974); *Handy v. Gayler*, 364 F. Supp. 676 (D.Md. 1973). In addition, this court has already pointed out that the exhaustion of administrative remedies is a jurisdictional requirement. In the present case, these class claims were not presented at the administrative level, thus falling short of the jurisdictional prerequisite. By allowing a class action in this situation, the court would be providing a vehicle to the plaintiffs for bypassing agency determination. This would violate Rule 82 of the Federal Rules of Civil Procedure which forbids any construction of the rules so as to extend the jurisdiction of the district court.

Finally, it is doubtful that the numerosity requirements of Rule 23(a)(1) can be met in this case. Besides the named plaintiffs in the present action, only one other T.V.A. employee could possibly meet the requirements previously

stated. The joinder of this single person could hardly be deemed impracticable.

5. Having ruled that at least two plaintiffs, Eastland and Sheffield, have satisfied the jurisdictional requirements for filing this action, the court must proceed to what it considers to be the final issue. Plaintiffs make the contention that federal employment discrimination cases arising under the 1972 amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* (Supp. II, 1972), are to be adjudicated pursuant to the same procedures and standards as are available in Title VII cases which challenge employment discrimination in the private sector. Following this reasoning, plaintiffs contend that the court in the instant case must grant each a *de novo* trial without regard to any previous findings at the administrative level. On the other hand, defendant T.V.A. argues that the court's function in this case is limited to a review of the administrative record to determine whether the decision is supported by the record and to insure that basic due process rights have been accorded the plaintiffs.

In order to reach a decision on this point, it is necessary to distinguish between the available remedies and relief accorded to private sector employees versus federal employees. With regard to private employees, amended Title VII of the Civil Rights Act of 1964 generally prohibits certain racially discriminatory employment practices as "unlawful employment practice." 42 U.S.C. §2000e-2(a)(1) (Supp. II, 1972). After specified proceedings before the Equal Employment Opportunity Commission, 42 U.S.C. §2000e-5(a) (Supp. II, 1972), the private employee may bring a civil action in the federal district court, 42 U.S.C. §2000e-5(f)(1),(3) (Supp. II,

1972). The Equal Employment Opportunity Commission has no power to grant any administrative remedy to a private employee who has been discriminated against, 42 U.S.C. §2000e-4(g) (Supp. II, 1972), but rather is limited to correcting the "alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. §2000e-5(b) (Supp. II, 1972). The federal district court is empowered to grant broad injunctive relief if it finds that any unlawful employment practice has been committed. 42 U.S.C. §2000e-5(g) (Supp. II, 1972).

In comparison, §717 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-16(a), (b) (Supp. II, 1972), grants the Civil Service Commission the power to enforce the provisions dealing with discrimination "through appropriate remedies . . . as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." Finally, §717(c), 42 U.S.C. §2000e-16(c) (Supp. II, 1972) provides that an employee who is aggrieved may "[w]ithin thirty days of receipt of final action . . . or after one hundred and eighty days from the filing of the initial charge until such time as final action may be taken . . . or by failure to take final action on his complaint, . . . file a civil action as provided in section 2000e-5 of this title. . . ." Section 717(d), 42 U.S.C. §2000e-16(d) (Supp. II, 1972) then makes applicable the "provisions of 2000e-5(f) through (k) of this title."

The federal district courts which have spoken to this issue are split. Several have held that a review of the legislative history of the Equal Employment Opportunity

Act of 1972 indicated an intent on the part of Congress to provide a plaintiff in a federal employment discrimination case with the same right to review as is enjoyed by private sector employees. *Henderson v. Defense Contract Admin. Serv. Reg. N.Y.*, 370 F. Supp. 180 (S.D.N.Y. 1973). *Jackson v. United States Civil Service Commission*, Civil No. 72-H-1003 (S.D.Tex., filed Dec. 13, 1973). *Griffin v. United States Postal Service*, Civil No. 72-487 (M.D.Fla., filed Feb. 7, 1973).

Several courts have taken a contra position. The court in *Hackley v. Johnson*, 360 F. Supp. 1247 (D.D.C. 1973), rejected the contention that the 1972 Act contained any requirement of an automatic trial *de novo*. Similarly, the court in *Handy v. Gayler*, 364 F. Supp. 676 (D.Md. 1973), ruled that the 1972 Act envisioned only a review of the administrative record. See *Spencer v. Schlesinger*, Civil No. 716-73 (D.D.C., filed Apr. 23, 1974). *Pointer v. Sampson*, Civil No. 1557-72 (D.D.C., filed Apr. 18, 1974). *Williams v. Mumford*, Civil No. 1633-72 (D.D.C., filed Aug. 17, 1973).

It is also interesting to note that the court in *Thompson v. United States Dept. of Justice*, 372 F. Supp. 762 (N.D.Cal. 1974), upon which many of the district courts holding in favor of a trial *de novo* relied, recently reversed itself and held in favor of review of the administrative record.

This court is persuaded by the reasoning of the latter cases. Particularly apropos at this point is the reasoning set forth by Judge Gesell in his opinion in *Hackley*.

> There is a need to establish an especially high standard of review in government employment cases involving aspects of discrimination prohibited by the Civil Rights Act of 1972, but an interpretation that embraces an automatic requirement of trial *de novo* in all instances with all its inherent uncertainties and substantial delays will defeat rather than advance the Act's objectives.
>
> The trial *de novo* is not required in all cases. The District Court is required by the Act to examine the administrative record with utmost care. If it determines that an absence of discrimination is affirmatively established by the clear weight of the evidence in the record, no new trial is required. If this exacting standard is not met, the Court shall, in its discretion, as appropriate, remand, take testimony to supplement the administrative record, or grant the plaintiff relief on the administrative record. 360 F. Supp. at 1252.

Accordingly, defendants' motion for summary judgment is granted against all plaintiffs' individual claims, except for plaintiffs Eastland and Sheffield, who are the only parties to affirmatively satisfy the exhaustion requirement. As to plaintiffs Eastland and Sheffield, a review of their administrative records will be granted to determine if the "exacting standard" established in *Hackley* by Judge Gesell has been met.

DONE this the 31st day of December, 1974.

s/ J. Foy Guin, Jr.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing petition for writ of certiorari has been served on all parties required to be served by mailing three copies thereof, postage prepaid, to Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530; Richard T. Seymour, Esq., Lawyers' Committee for Civil Rights Under Law, 733 Fifteenth Street, NW., Washington, D.C. 20005, U. W. Clemon, Esq., Adams, Baker and Clemon, 1600 The 2121 Building, Birmingham, Alabama 35203, and Susan W. Reeves, Esq., Lawyers' Committee for Civil Rights Under Law, 314 Frank Nelson Building, Birmingham, Alabama 35203, attorneys for respondents; Bernard E. Bernstein, Esq., Bernstein, Dougherty & Susano, 1200 United American Bank Building, Knoxville, Tennessee 37902, attorney for Salary Policy Employee Panel; and Jerome A. Cooper, Esq., Cooper, Mitch & Crawford, 409 North Twenty-first Street, Birmingham, Alabama 35203, attorney for Tennessee Valley Trades and Labor Council.

This 20th day of September, 1977.

Herbert S. Sanger, Jr.
Attorney for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-446

TENNESSEE VALLEY AUTHORITY, ET AL., *Petitioners,*

v.

FRANK L. EASTLAND, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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October 25, 1977

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully oppose the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

COUNTERSTATEMENT OF THE STATUTE AND REGULATIONS INVOLVED

In addition to the provisions cited by the petitioners, the following provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended by the

Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 103, are involved:

> Sec. 706(g). If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. . . .
>
> • • •
>
> (k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.
>
> • • •
>
> Sec. 717(d). The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.
>
> (e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

In addition to the provisions cited by the petitioners, the following provisions of Title 5 of the Code of Federal Regulations are involved:

5 C.F.R. § 713.234 Appellate procedures.

> The Appeals Review Board shall review the complaint file. . . . The board shall issue a written decision . . . and shall send copies thereof to the complainant . . . . The decision of the board is final, but shall contain a notice of the right to file a civil action in accordance with § 713.282.

§ 713.282 Notice of right.

> An agency shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any final action on a complaint under §§ 713.215, 713.217, 713.220, or § 713.221. The Commission shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any decision under § 713.234.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Where § 717(d) of the amended Civil Rights Act of 1964 expressly states that "[t]he provisions of section 706(f) through (k), as applicable, shall govern civil actions brought" under § 717, shall the same principles govern the scope of a lawsuit brought under § 717 as govern the scope of a lawsuit brought under § 706(f)?

2. Under the circumstances stated above, shall the same principles govern the availability of class relief under § 717 as govern the availability of class relief under § 706(g)?

3. If the answer to the second question is in the affirmative, shall the ordinary right of a class member to intervene or be joined as a party in a class action, without independently satisfying jurisdictional requirements, be precluded in cases brought under § 717?

4. The petitioners' third question presented.

COUNTERSTATEMENT OF THE CASE

After exhausting his administrative remedies and receiving from the U.S. Civil Service Commission a letter informing him of his right to bring suit, respondent Eastland timely filed this action on May 21, 1973. The original Complaint alleged a broad range of racially discriminatory employment practices by the Tennessee Valley Authority (TVA) at its Muscle Shoals, Alabama operations and facilities, and was brought on behalf of the respondent and the class of black applicants and employees he sought to represent. By leave of the district court, an Amended Complaint was filed on October 19, 1973. The Amended Complaint added two new parties defendant for the purposes of relief, and added eleven new plaintiffs.

Two of the eleven new plaintiffs—respondents Sheffield and James—had exhausted their administrative remedies and had brought suit (by way of the motion for leave to file the Amended Complaint) within thirty days of their receipt of letters notifying them of their right to sue. Five of the new plaintiffs—respondents Oates, Vinson, Cohen, Fuqua and Puryear—had filed administrative charges of discrimination, received adverse agency decisions, appealed to the Appeals Review Board of the Civil Service Commission, and had been notified that the Board had decided their cases adversely. In violation of its own regulations, the Civil Service Commission did not notify these respondents of their right to file a civil action, but stated only that its decision was final and that they had no further right of administrative appeal. These respondents alleged that they did not know of their right to file a civil action, and more than thirty days thus passed before they brought suit. The remaining four new plaintiffs—respondents Fitzgerald, Ricks, Nash and Littleton—had not independently satisfied the jurisdictional requirements to bring suit under Title VII, but sought intervention or joinder as class members.

Both the original Complaint and the Amended Complaint alleged violations of Title VII, of the Fifth Amendment, and of other provisions. Both sought back pay and injunctive relief against the head of the agency under § 717, and both sought monetary relief against petitioners Wagner and Nelson in their individual capacities.

The petitioners had moved to dismiss, or in the alternative for summary judgment, in August 1973 and renewed their motion after the filing of the Amended Complaint. The district court granted the motion in substantial part, holding that all plaintiffs other than respondents Eastland and Sheffield had failed to meet independent jurisdictional prerequisites to suit,[1] that class treatment was unavailable as a matter of law, that in any event only those persons who had independently satisfied the jurisdictional prerequisites to suit could be treated as class members, and that there was no right to a trial *de novo* in an action brought under § 717. Pet. A-15 to A-31. The district court subsequently granted summary judgment against respondent Sheffield on the basis of his administrative record, and remanded respondent Eastland's claim to the administrative process.

On appeal, the Fifth Circuit affirmed the entry of summary judgment against respondents Fitzgerald, Ricks, Nash, Littleton, Vinson, Oates, Cohen, Fuqua and Puryear as plaintiffs in their own right, but held that they may be allowed to intervene as class members in the event that the district court subsequently determines class certification to be proper. The court of appeals also

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[1] The district court inconsistently found (a) that respondent James had not exhausted his administrative remedies, and (b) that he had exhausted such remedies but that summary judgment should be entered against him based on the administrative record. *Compare* Pet. A-14 *with* Pet. A-26 to A-27. The Fifth Circuit reversed, Pet. A-7 to A-8, and petitioners do not challenge its ruling here.

held that respondents are entitled to a trial *de novo* of their claims of discrimination, that class treatment is available under § 717, that the class may include persons who have not themselves exhausted the administrative process, and that the judicial action is not necessarily restricted to the specific contentions raised in the administrative complaint, but may include "those issues that may reasonably be expected to grow out of the administrative investigation of their claims." Pet. A-1 to A-12. In its February 28, 1977 decision, the court of appeals affirmed the entry of summary judgment on the claims based on 42 U.S.C. § 1981 and on the Fifth Amendment, Pet. A-8, but in its May 23, 1977 modification deleted the reference to the Fifth Amendment. Pet. A-12. Finally, the court of appeals allowed respondents two-thirds of their costs.

Neither the district court nor the court of appeals ever decided or addressed the question whether a court may enter judgment for "money damages and costs" against "defendants other than the 'head of the . . . agency'" in cases brought under § 717(c). Neither court decided or addressed the question whether any defendants herein were not properly sued.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The decision sought to be reviewed did little more than apply to the issues before it the rationale of this Court's decision in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), and the holdings of prior decisions of this Court respecting the procedural rights of class members.

In *Chandler*, 425 U.S. at 846-48 and 857-61, this Court held that § 717(d) generally incorporates into § 717 cases the procedures of §§ 706(f) through (k) other than those detailing the enforcement responsibilities of the EEOC

and the Attorney General, and that the primary intent of Congress in adopting this section was to provide the same procedural rights in private lawsuits under § 717 as in private lawsuits under § 706. This Court found that Congress intended to avoid "remedial disparity" in the two types of cases, and desired "equal treatment of private-sector and federal-sector complainants." 425 U.S. at 857.

Thus, this Court's holdings in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 note 8 (1975), and in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 771 (1976), govern the instant case: nonexhausting class members may receive individualized relief in class actions brought under § 706. Nothing in the language or legislative history of § 717 precludes the application of this principle to Federal-sector claims of discrimination, and no court of appeals has held to the contrary. The only other appellate decisions on point, *Hackley* v. *Roudebush*, 520 F.2d 108, 151-53 note 177 (D.C.Cir. 1975), and *Williams* v. *Tennessee Valley Authority*, 552 F.2d 691, 697 (6th Cir., 1977), *petition for rehearing pending*, are in full agreement with the decision in the case at bar.[2]

Similarly, it has long been settled that the old rules of common law pleading do not apply to administrative charges of discrimination filed under § 706, and that a charging party—who is usually without the benefit of counsel at the time that the charges are filed—may challenge in court any practice which a reasonable investigation of his or her allegations would have included.[3] For example,

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[2] The "conflict" described by petitioners, Pet. 12, is no more than a tentative class definition in *Williams* which overlaps with the description of the potential class in the original Complaint and Amended Complaint herein. There are readily available procedures for the resolution of such matters in the event that the district court herein ultimately certifies the class described.

[3] *Sanchez* v. *Standard Brands*, 431 F.2d 455, 466 (5th Cir., 1970); *Gamble* v. *Birmingham Southern R.R. Co.*, 514 F.2d 678, 687-89

a charging party may allege that he or she was not promoted because of race. Lacking the kinds of factual information which a trained investigator could discover, he or she may not know that the actual cause of the denial of promotion may have been discrimination on some other prohibited basis,[4] or a general pattern of discrimination in favor of less-qualified whites.[5] The charging party harmed by a facially neutral practice, such as a test or an educational requirement, may, because of his or her lack of legal sophistication, be completely unaware that the practice is open to challenge. To limit the scope of a subsequent lawsuit to the matters expressly stated in the administrative charge is to limit the charging party's access to the courts in proportion to his or her degree of sophistication. *Cf. Goldberg* v. *Kelly,* 397 U.S. 254, 268-69 (1970), which held that the restriction of welfare recipients' right to participate in hearings on the revocation of their benefits to the submission of written statements was such a barrier to effective participation as to deprive them of due process. *See also Haines* v. *Kramer,* 404 U.S. 519, 520 (1972), and *Love* v. *Pullman Co.,* 404 U.S. 522, 527 (1972).

(5th Cir., 1975); *Tipler* v. *E.I. duPont de Nemours & Co.,* 443 F.2d 125, 131 (6th Cir., 1971); *Graniteville Co. (Sibley Div.)* v. *EEOC,* 438 F.2d 32, 37-39 (4th Cir., 1971); *Russell* v. *American Tobacco Co.,* 528 F.2d 357, 365 (4th Cir., 1975), *cert. den.,* 425 U.S. 935 (1976); *Jenkins* v. *Blue Cross Mut. Hosp. Ins.,* 538 F.2d 164, 167-68 (7th Cir., 1976) (*en banc*).

[4] In *Sanchez,* the plaintiff thought that she had been discriminated against because of sex, but the EEOC investigation determined that she had actually been discriminated against because of her national origin.

[5] Neither applicants nor employees ordinarily know the qualifications of other applicants and employees. The information to establish patterns of disparate treatment must be obtained in either an agency investigation or in the court discovery process.

Congress was aware of the subtle and complex nature of many discrimination claims when it passed the Equal Employment Opportunity Act of 1972,[6] but took no action to restrict access to the courts along the lines suggested by petitioners. Its concern was to effectuate, not limit, the promise of nondiscrimination in employment. The Fifth Circuit therefore did not err in following the rationale of *Chandler* and extending the scope-of-suit principles developed in § 706 cases to the case at bar. No court of appeals has ruled to the contrary.[7]

TVA complains as well of the Fifth Circuit's holding that class members may intervene in a proper class action brought under § 717, without independently satisfying jurisdictional requirements.[8] Here, the court of ap-

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[6] The Report of the House Committee on Education and Labor stated in pertinent part:

> . . . The forms and incidents of discrimination which the Commission is required to treat are increasingly complex. Particularly to the untrained observer, their discriminatory nature may not appear obvious at first glance. . . .
>
> It is increasingly obvious that the entire area of employment discrimination is one whose resolution requires not only expert assistance, but also the technical perception that a problem exists in the first place, and that the system complained of is unlawful.

H. Rep. No. 92-238 (92nd Cong., 1st Sess.) at 8, 1972 *U.S. Code Cong. & Admin. News* 2137, 2144.

[7] *Ettinger* v. *Johnson,* 518 F.2d 648, 651-52 (3rd Cir., 1975), is not necessarily in conflict with the Fifth Circuit's holding in *Eastland.* The Third Circuit's discussion does not make clear the nature of the act required to "raise" an issue in the administrative process, and nothing in the opinion indicates that that court would disagree with the *Eastland* decision. The table affirmance in *Kurylas* v. *U.S. Dept. of Agriculture,* 514 F.2d 894 (D.C. Cir., 1975), does not even indicate the issues on which the court of appeals was asked to rule, let alone those it considered dispositive. *Weinberger* v. *Salfi,* 422 U.S. 749 (1975), was a Social Security case and has nothing to do with the case at bar.

[8] In the event that the Court decides to grant certiorari on this

peals did no more than effectuate the ordinary rule adopted by this Court in *Stewart* v. *Dunham,* 115 U.S. 61, 64 (1885) and in *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356, 366 (1921). See 3B Moore's *Federal Practice* ¶ 24.18[3] at p. 24-782 (1977). This rule was extended to private-sector Title VII cases in *Oatis* v. *Crown Zellerbach Corp.,* 398 F.2d 496, 499 (5th Cir., 1968), and the panel below followed the rationale of *Chandler* in applying the rule to § 717 class actions. No court of appeals has ruled to the contrary.[9]

The petitioners also complain that the court of appeals assessed costs against those petitioners who were not the "head" of TVA. In fact, the court of appeals merely entered an order generally assessing two-thirds of respondents' costs. The costs will undoubtedly be paid by the "head" of TVA in his official capacity, and the

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issue, a "subsidiary question fairly comprised therein", Supreme Court Rule 23(1)(c), is whether the court of appeals correctly held that respondents Oates, Vinson, Cohen, Fuqua and Puryear had not timely filed suit.

Section 717(b) of the Act authorizes the Civil Service Commission to issue legislative regulations, and 5 C.F.R. §§ 713.234 and 713.282 require the Commission to notify complainants of their right to file suit. The court below held that these regulations could not "override the jurisdictional requirement that suit be filed" within thirty days. Pet.A-6. In fact, these regulations merely prescribe the type of notice which in fairness should start the thirty-day period running, and this is clearly consistent with the statutory grant of rulemaking authority.

Two courts of appeals have decided the question in a manner that conflicts with the decision of the Fifth Circuit. *Allen* v. *United States,* 542 F.2d 176, 179-80 (3rd Cir., 1976); *Coles* v. *Penny,* 531 F.2d 609, 616-17 (D.C. Cir., 1976).

[9] The petitioners have suggested that the decision of the Fifth Circuit would resurrect some claims already decided adversely to some of the respondents in court. This is not correct; the respondents have other claims, not barred by *res judicata,* which may be asserted in a proper class action.

question raised by the petitioners—which apparently assumes that the "head" of TVA will refuse to pay the costs and that the other defendants will then be forced to pay them—is too hypothetical to warrant the issuance of a writ of certiorari.

Finally, it must be pointed out that the United States has repudiated the position of TVA that the procedural rights of Federal-sector plaintiffs in court cases brought under § 717 should differ from those of private-sector plaintiffs in court cases brought under § 706. Not only has the Solicitor General refused to represent the petitioners before this Court,[10] but the Attorney General has also expressly acquiesced in the decision petitioners seek to have reviewed, and has directed all United States Attorneys and agency General Counsels not to raise the types of arguments TVA raises herein. Memorandum of the Attorney General on Title VII Litigation, August 31, 1977.[11]

For the reasons stated above, respondents pray that this Court deny the petition.

Respectfully submitted,

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October 25, 1977

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[10] Application for an Extension of Time Within Which to Petition for a Writ of Certiorari, August 1977.

[11] The Memorandum is reproduced in the Appendix to this brief.

APPENDIX

APPENDIX

MEMORANDUM FOR UNITED STATES ATTORNEYS AND AGENCY GENERAL COUNSELS

Re: Title VII Litigation

In 1972, as additional evidence of our Nation's determination to guarantee equal rights to all citizens, Congress amended Title VII of the Civil Rights Act of 1964 to provide Federal employees and applicants for Federal employment with judicially enforceable equal employment rights. The Department of Justice, of course, has an important role in the affirmative enforcement of rights under the Act, in both the private and public sectors. To effectively discharge those responsibilities, we must ensure that the Department of Justice conducts its representational functions as defense attorneys for agencies in suits under the Act in a way that will be supportive of and consistent with the Department's broader obligations to enforce equal opportunity laws. This memorandum is issued as part of what will be a continuing effort by the Department to this end.

Congress, in amending Title VII, has conferred upon Federal employees and applicants the same substantive right to be free from discrimination on the basis of race, color, sex, religion, and national origin, and the same procedural rights to judicial enforcement as it has conferred upon employees and applicants in private industry and in state and local governments. *Morton* v. *Mancari,* 417 U.S. 535 (1974); *Chandler* v. *Roudebush,* 425 U.S. 840 (1976). And, as a matter of policy, the Federal Government should be willing to assume for its own agencies no lesser obligations with respect to equal employment opportunities than those it seeks to impose upon private and state and local government employers.

In furtherance of this policy, the Department, whenever possible, will take the same position in interpreting Title

VII in defense of Federal employee cases as it has taken and will take in private or state and local government employee cases. For example, where Federal employees and applicants meet the criteria of Rule 23 of the Federal Rules of Civil Procedure, they are also entitled to the same class rights as are private sector employees. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 (1975). Further, the Department of Justice has acquiesced in the recent rulings of the Fifth and Sixth Circuit Courts of Appeals that it is unnecessary for unnamed class members to exhaust their administrative remedies as a prerequisite to class membership. *Eastland* v. *TVA*, 553 F.2d 364 (5th Cir. 1977); *Williams* v. *TVA*, —— F.2d —— (6th Cir. 1977). Consequently, we will no longer maintain that each class member in a Title VII suit must have exhausted his or her administrative remedy.

In a similar vein, the Department will not urge arguments that rely upon the unique role of the Federal Government. For example, the Department recognizes that the same kinds of relief should be available against the Federal Government as courts have found appropriate in private sector cases, including imposition of affirmative action plans, back pay and attorney's fees. *See Copeland* v. *Usery*, 13 EPD ¶ 11,434 (D.D.C. 1976); *Day* v. *Mathews*, 530 F.2d 1083 (D.C. Cir. 1976); *Sperling* v. *United States*, 515 F.2d 465 (3d Cir. 1975). Thus, while the Department might oppose particular remedies in a given case, it will not urge that different standards be applied in cases against the Federal Government than are applied in other cases.

The Department, in other respects, will also attempt to promote the underlying purpose of Title VII. For example, the 1972 amendments to Title VII do not give the Government a right to file a civil action challenging an agency finding of discrimination. Accordingly, to avoid any appearance on the Government's part of unfairly hindering Title VII law suits, the Government will not attempt to

contest a final agency or Civil Service Commission finding of discrimination by seeking a trial *de novo* in those cases where an employee who has been successful in proving his or her claim before either the agency or the Commission files a civil action seeking only to expand upon the remedy proposed by such final decision.

The policy set forth above does not reflect, and should not be interpreted as reflecting, any unwillingness on the part of the Department to vigorously defend, on the merits, claims of discrimination against Federal agencies where appropriate. It reflects only a concern that enforcement of the equal opportunity laws as to all employees be uniform and consistent.

In addition to the areas discussed above, the Department of Justice is now undertaking a review of the consistency of other legal positions advanced by the Civil Division in defending Title VII cases with those advocated by the Civil Rights Division in prosecuting Title VII cases. The objective of this review is to ensure that, insofar as possible, they will be consistent, irrespective of the Department's role as either plaintiff or defendant under Title VII. As a part of this review, "the Equal Employment Opportunity Cases" section of the Civil Division Practice Manual (§ 3-37), which contains the Department's position on the defense of Title VII actions brought against the Federal Government, is being revised. When this revision is completed, the new section of the Civil Division Practice Manual will be distributed to all United States Attorneys' Offices and will replace the present section. Each office should rely on the revised section of the Manual for guidance on legal arguments to be made in Title VII actions. In order to ensure consistency, any legal arguments which are not treated in the Manual should be referred to the Civil Division for review prior to their being advocated to the court.

This policy statement has been achieved through the cooperation of Assistant Attorney General Barbara Babcock of the Civil Division who is responsible for the defense of these Federal employee cases, and Assistant Attorney General Drew Days of the Civil Rights Division who is my principal adviser on civil rights matters. They and their Divisions will continue to work closely together to assure that this policy is effectively implemented.

/s/ GRIFFIN B. BELL
Griffin B. Bell

August 31, 1977